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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IAIN CALDER and JOHN SOUTH,
Appellants,

v.

SHIRLEY JONES and MARTY INGELS,
Appellees.

On Appeal from the California Court of Appeal, Second Appellate District

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STATEMENT AS TO JURISDICTION

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QUESTIONS PRESENTED

1. In determining whether the Constitution permits personal jurisdiction over an out-of-state reporter and editor in a libel case, is it improper to give weight to the First Amendment?

2. Do the First and Fourteenth Amendments and the Commerce Clause permit a California court to assert personal jurisdiction over a Florida editor and reporter solely on the ground that they worked in Florida on an article published by their Florida employer which allegedly injured California residents?

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On Appeal from the California Court of Appeal, Second Appellate District

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STATEMENT AS TO JURISDICTION

Appellants appeal from the judgment of the California Court of Appeal, Second Appellate District, entered in this case on December 15, 1982, holding that California Code of Civil Procedure § 410.10, as applied to authorize personal jurisdiction over Appellants in this case, does not violate the First and Fourteenth Amendments and the Commerce Clause of the United States Constitution.

OPINIONS BELOW

The opinion of the Court of Appeal is reported officially at 138 Cal. App. 3d 128 and unofficially at 187 Cal. Rptr. 825. It is reproduced in Appendix A, *infra.* The order of the Supreme Court of California denying hearing without opinion is unreported; it is reproduced in Appendix B, *infra.* The opinion of the Superior Court of the State of California for the County of Los Angeles holding that it had no personal jurisdiction over Appellants is unreported; it is reproduced in Appendix C, *infra.*

JURISDICTION

The judgment of the California Court of Appeal was entered December 15, 1982. The Supreme Court of California denied a timely petition for hearing on February 10, 1983. Notice of appeal to this Court was filed in the Court of Appeal on February 16, 1983. This Court has jurisdiction under 28 U.S.C. § 1257(2).

STATUTE INVOLVED

California Code of Civil Procedure § 410.10 provides:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States:"

RAISING THE FEDERAL QUESTION

After receiving service of process by mail in Florida, Appellants by special apperance moved to quash service, challenging the validity under the First and Fourteenth Amendments of the United States Constitution of applying the California jurisdictional statute, Cal. Code of Civil Procedure § 410.10, to them. The trial court agreed with Appellants that the statute could not constitutionally be applied to them because "as the U.S. Supreme Court has made abundantly clear in its *World-Wide Volkswagen* and *Kulko* opinions, California may not assert jurisdiction beyond that which is permitted under the United States Constitution." Pp. 17a-18a, *infra*. In the court below, Appellants argued that "Were it to be interpreted otherwise [than as excluding them]," § 410.10 would violate the Due Process Clause of the Fourteenth Amendment." The court below rejected that argument. Appellants argued to the Supreme Court of California that "as now interpreted by the Court of Appeal in this case, § 410.10 violates the due process and free speech guarantees of the California and United States Constitutions." That court denied review. Because the constitutionality of the statute as applied was drawn into question, and

the decision below upheld its validity, this Court has jurisdiction on appeal under 28 U.S.C. § 1257(2). See, *e.g.*, *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 440-441 (1979); *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 289 (1921).[1]

STATEMENT

A. Facts.

Appellees, who are professional entertainers and California residents, brought this action for libel and related torts in a California state court against the National Enquirer, Inc., its local distributing company and the two Appellants, who are individuals. The claim was based on an article appearing in the Enquirer's October 9, 1979 issue.[2] Appellees demanded $20,000,000 from the defendants.

Appellant Calder is employed as editor and president of the Enquirer. Appellant South is employed by the Enquirer as a reporter, and his byline appeared on the article. Both Appellants are and were at all relevant times citizens and residents of Florida.

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[1] Although California's jurisdictional statute is drafted in terms that purport to be identical with constitutional limits, its constitutionality as applied was challenged below. However, if for any reason this Court were to conclude that appellate jurisdiction is lacking under 28 U.S.C. § 1257(2), we respectfully request that this jurisdictional statement be treated pursuant to 28 U.S.C. § 2103 as a petition for certiorari under 28 U.S.C. § 1257(3). *Cf. Kulko* v. *Superior Court*, 436 U.S. 84, 90 n.4 (1978). Title 28 U.S.C. § 2403(b) may be applicable.

[2] The Enquirer, which is a Florida corporation with principal place of business in Florida, did not contest the California court's jurisdiction and answered the complaint. The distributing company also answered and made no objection to the jurisdiction. The article stated that Appellee Ingels "has terrorized his staff, cheated stars, outraged advertisers and scandalized Hollywood" and "has one of the most notorious casting couches in all of Hollywood," and that Appellee Jones "has been driven to drink by his bizarre behavior."

The two Appellants were served with process by mail in Florida in accordance with the California "long-arm" statute, under the jurisdictional provisions of Cal. Code of Civil Procedure § 410.10. They caused special appearances to be entered on their behalf and moved to quash service of process, challenging the constitutionality under the First Amendment and Fourteenth Amendments of the application of § 410.10 to them. Affidavits and deposition testimony, none of which was disputed, showed the following:

—As to Appellant Calder, he is the editor of the newspaper with general supervision of its editorial activities and works at its single editorial office in Lantana, Florida. His duties were, in his words, "basically to oversee just about every function of the Enquirer." Calder never has had an office or place of business in California, nor has he ever engaged in any business activity in or with California in his personal capacity. Calder did not participate at all in the investigation, research, or writing of the article complained of. He performed only routine editorial services, and any such took place in his Florida office. P. 23a, *infra*.[4]

—Appellant South is a reporter employed by the Enquirer. Like Calder, he is a Florida resident and his office is at the Enquirer newsroom in Florida. He has never had an office in California, nor has he ever engaged in any business activity there in his personal capacity, nor owned assets nor maintained a bank account there. All of South's services in connection with the article, according to his uncontradicted affidavit, took place in Florida. P. 25a, *infra*.

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[3] Petitioners argued in the Court of Appeal that jurisdiction over employees in such circumstances also would unconstitutionally burden interstate commerce.

[4] Appellant Calder testified in a deposition that although he did not read the story when it was prepared, he probably saw the final page proofs of the article, "I would imagine I saw that." He stated that he also declined to print a retraction, because "I think we stand by the article and as far as I'm concerned the story is true."

South testified without contradiction that he was a party to at most four telephone calls to California that related to the article; three involved the investigation, and one was a call to one of the plaintiffs for verification or comment. All of these calls were placed by South from his Florida office. South also stated that over a four-year period in the course of his employment he had had occasion to travel to California more than twenty times in total over the four years. However, none of those trips, he testified, was connected with the article. See p. 25a, *infra*.[5]

B. The Superior Court's Ruling.

Based on the evidence submitted, which was all documentary, the trial court found:

> "From the record in this case, it appears that neither South nor Calder maintained any residence or business office within California. Editor Calder did not enter California nor even make telephone calls into the state during his work on the Ingels article. Reporter South made a few telephone calls into California, including one in which he read the substance of the article to plaintiff Ingels shortly before its publication. In addition, it may fairly be inferred from the record before the Court that Reporter South visited California at least once for purposes relating to the article. The totality of such contacts, in this Court's view, are insubstantial." P. 16a, *infra*.[6]

After ordering argument on the question whether the First Amendment had bearing on the jurisdictional out-

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[5] Twice during the year preceding the article Appellant South met in California with a frequent Enquirer source, John Lucas, with whom he discussed several possible stories. The record contains no evidence, however, that the subject of the article complained of was discussed at either meeting, and South's testimony that it was not is uncontradicted.

[6] The court's unexplained inference that South made one visit to California connected with the article had no basis in the record, in which South's contrary statement was uncontradicted. The court of appeal nevertheless accepted that inference. P. 4a, *infra*. See n. 15, *infra*.

come, the trial court granted the motions and held that it had no personal jurisdiction over either Appellant. Citing *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), *Kulko* v. *Superior Court*, 436 U.S. 84 (1978), and *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and distinguishing products-liability cases, the court emphasized that

> "The question presented by this case is whether further consideration is required because the case involves First Amendment freedom of expression and because the defendants sought to be brought into this jurisdiction are employees of the publisher. . . . [A]s the U.S. Supreme Court has made abundantly clear in its *World-Wide Volkswagen* and *Kulko* opinions, California may not assert jurisdiction beyond that which is permitted under the United States Constitution." Pp. 17a-18a, *infra*.

The court relied on authorities from the Second and Fifth Circuits [7] in further concluding that

> "the cases seem to be in agreement that First Amendment considerations should be weighed in the balance of fundamental fairness in resolving whether a state can compel a nonresident defendant to appear and defend an action. This proposition of federal constitutional law is binding upon this Court." P. 18a, *infra*.

C. The Court of Appeal's Reversal.

On appeal, however, the California Court of Appeal reversed, and held that the California statute could constitutionally be applied to both Florida Appellants, whom it described as "employees of the publisher of the allegedly defamatory article herein." P. 5a, *infra*. The court of appeal did not challenge the findings of the trial court; indeed, it acknowledged that

> "Neither defendant has ever owned assets or bank accounts in California, or engaged in business or been

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[7] *Buckley* v. *New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967); *Walker* v. *Savell*, 335 F.2d 536 (5th Cir. 1964); *New York Times Co.* v. *Connor*, 365 F.2d 567 (5th Cir. 1966); *Edwards* v. *Associated Press*, 512 F.2d 258 (5th Cir. 1975).

> employed there. It may not be said that defendants' activities in California are extensive, wide-ranging, substantial, continuous or systematic.
>
> • • • •
>
> "As the trial court observed, defendant Calder did not enter California or even make telephone calls into the state in connection with his role in the preparation of the subject article; all of his acts with reference to that article apparently were performed in Florida." Pp. 6a-7a, *infra*.

Nevertheless, the court held, California's jurisdiction over the Florida editor and reporter was established simply because the complaint alleged an intentional tort with injury in California. As the court of appeal explained its view of the law:

> "For the purpose of determining whether a California court may assume jurisdiction over Calder in this lawsuit, it must be presumed that Calder, in participating in the publication of the article as its editor, intended to cause injury to plaintiffs in California where they reside; such injury in fact occurred. Accordingly, a valid basis exists for California's exercise of personal jurisdiction over Calder with respect to the causes of action alleged herein." P. 8a, *infra*.

The same reasoning, the court of appeal continued, also sufficed to create jurisdiction over Appellant South, the reporter. It went on to hold that, alternatively, jurisdiction over him could be established simply by his having made one telephone call from Florida to one of Appellees, p. 10a, *infra*; or, alternatively, by his other telephone calls (and, the court hypothesized,[8] one visit) from Florida to California to gather information for the article, pp. 9a-10a, *infra*. The court also weighed "the inconvenience to the defendant" against such other factors as "the interest of the plaintiff in suing locally" and the "interest of a state in providing a forum for its residents." P. 12a, *infra*.

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[8] See note 6, *supra*.

On two separate points of federal law, the court acknowledged that its decision was in conflict with cases from other jurisdictions. First, it noted that other courts, including the Ninth Circuit,[9] had held that acts of an out-of-state corporate employee in his corporate role would not establish jurisdiction over him. However, it specifically declined to follow those cases. Pp. 10a-11a, *infra*.

As for the First Amendment, the court of appeal held that it was reversible error for the trial court to have considered the First Amendment at all:

> "Plaintiffs contend that the trial court improperly applied a special First Amendment test in determining that the court may not assume jurisdiction over defendants Calder and South. We agree." P. 4a, *infra*.

The court of appeal held that "personal jurisdiction over them must be determined in accord with traditional principles unaffected by First Amendment considerations." P. 5a, *infra*. The court acknowledged that its ruling on this point was contrary to the holdings from the Fifth Circuit that had been relied on by the trial court, but said it preferred to follow opposing authority from other circuits.[10] Pp. 4a-5a, *infra*.

The court below ordered that its opinion be published.[11] The Supreme Court of California denied review.

THE QUESTIONS ARE SUBSTANTIAL

This case concerns personal jurisdiction asserted over two out-of-state individuals who work for a publishing

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[9] *Forsythe* v. *Overmyer*, 576 F.2d 779 (9th Cir.), *cert. denied*, 439 U.S. 864 (1978).

[10] The cases on which it relied as having rejected the Second and Fifth Circuit decisions were *Church of Scientology* v. *Adams*, 584 F.2d 893 (9th Cir. 1978); and *Anselmi* v. *Denver Post, Inc.*, 552 F.2d 316 (10th Cir.), *cert. denied sub nom. Times Mirror Co.* v. *Anselmi*, 432 U.S. 911 (1977).

[11] Under California procedure "No opinion of a Court of Appeal . . . shall be published . . . unless such opinion (1) establishes a new rule of law or alters or modifies an existing rule, (2) involves a legal issue of continuing public interest, or (3) criticizes existing law." Cal. Rule of Court 976 (footnotes omitted).

company. On three important issues, the decision below conflicts with holdings of several U.S. courts of appeals and of at least two state supreme courts:

—On the question whether the First Amendment is to be weighed in determining personal jurisdiction over publishers or publishers' employees, there is an acknowleged split in the States and circuits. This record presents the issue in a clear and simple form.

—On the separate question whether jurisdiction can be obtained personally over individual out-of-state corporate employees merely by alleging they were responsible for what the corporation did, there is also a conflict in the lower courts. Most courts hold that the "fiduciary shield" doctrine bars personal jurisdiction over the out-of-state employee. Because the court below rejected the majority view, its decision conflicts with holdings by at least two state courts and five federal courts of appeals—including the federal courts of its own State of California.

—On the question whether telephone calls into a State are constitutionally sufficient to establish personal jurisdiction, the holding of the court below is again in conflict with the contrary holding of the federal court of appeals whose circuit includes California.

—On all three points, the decision below cannot be reconciled with decisions of this Court.

I. IN HOLDING THAT IT IS IMPROPER TO CONSIDER THE FIRST AMENDMENT WHEN WEIGHING PERSONAL JURISDICTION OVER OUT-OF-STATE EMPLOYEES OF AN OUT-OF-STATE PUBLISHER, THE DECISION BELOW CONFLICTS WITH HOLDINGS IN SIX FEDERAL CIRCUITS AND BY ONE STATE SUPREME COURT.

There is a widening split of authority in the lower courts as to whether, when weighing the contacts needed to establish jurisdiction over out-of-state publishers under *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), courts should consider the effect of such extra-

territorial jurisdiction on the exercise of First Amendment rights. The court below acknowledged the split, and said it chose not to follow the authorities relied on by the trial court.

The Fifth, Eleventh, and D.C. Circuits hold, as one of them stated a few months ago, that "federal jurisdiction is subject to First Amendment considerations when a nonresident publisher is sued for libel." *Cox Enterprises, Inc.* v. *Holt*, 678 F.2d 936, 937, *rehearing on other grounds*, 691 F.2d 989 (11th Cir. 1982). As the Fifth Circuit put the rule, "when a court attempts to assess whether jurisdiction over a defendant is reasonable, First Amendment considerations are a significant factor to be weighed." *Edwards* v. *Associated Press*, 512 F.2d 258, 266 (5th Cir. 1975). See also *Wolfson* v. *Houston Post Co.*, 441 F.2d 735 (5th Cir. 1971); *New York Times Co.* v. *Connor*, 365 F.2d 567 (5th Cir. 1966); *Walker* v. *Savell*, 335 F.2d 536 (5th Cir. 1964); *Margoles* v. *Johns*, 333 F. Supp. 942 (D.D.C. 1971), *aff'd*, 483 F.2d 1212 (D.C. Cir. 1973).

The Second Circuit applies essentially the same considerations by a slightly different analysis. In *Buckley* v. *New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967), Judge Friendly for the court wrote that "the First Amendment could be regarded as giving *forum non conveniens* special dimensions and constitutional stature in actions for defamation against publishers and broadcasters." 373 F.2d at 183-84. Judge Medina, concurring, added that "I am not shocked to see the principles embedded in the First Amendment applied to the expanding subject of jurisdiction over the person." 373 F.2d at 184.

In two more circuits it has been held at the district-court level that consideration of the First Amendment is necessary when weighing extraterritorial personal jurisdiction over publishers. Thus a year ago Chief Judge Lord of the Eastern District of Pennsylvania acknowledged the split in the circuits, explaining that

> "the Tenth Circuit purports to be in complete disagreement with the Fifth Circuit on this issue." *McCabe* v. *Kevin Jenkins and Associates, Inc.*, 531 F. Supp. 648, 655 (E.D. Pa. 1982).

He concluded that "I choose to follow the more persuasive reasoning and logic of the Fifth Circuit," because "if courts freely found *in personam* jurisdiction over publishers of first amendment articles under the same standards imposed on commercial entities, the citizens of each state would soon find themselves with access only to those publications with in-state revenues sufficiently high to justify the cost of litigation within that particular jurisdiction." 531 F. Supp. at 654, 655. The rule that the First Amendment applies to the jurisdictional analysis has also been adopted in the largest district in the Seventh Circuit. *Gonzales* v. *Atlanta Constitution*, 4 Media L. Rptr. 2146 (N.D. Ill. 1979).

The decision below also conflicts with one handed down five months earlier by the Supreme Court of Georgia. In that case the Georgia Court explicitly held that First Amendment considerations apply in determining personal jurisdiction in a defamation case; moreover, it also held that contacts sufficient to establish jurisdiction over a corporate employer did *not* suffice to establish personal jurisdiction over (as here) an out-of-state employee. *Bradlee Management Services, Inc.* v. *Cassells*, 249 Ga. 614, 292 S.E.2d 717 (1982).[12]

The court below explicitly rejected the Fifth Circuit authorities, and chose not to discuss any of the additional cases from other jurisdictions that were cited to it. Instead, it relied on cases from three other circuits (two courts of appeals and one district court) which have declined to follow the majority rule: *Church of Scientology*

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[12] Also supporting consideration of the First Amendment in the jurisdictional analysis are distinguished commentators on jurisdiction. Weinstein, *Trends in Civil Practice*, 62 COLUM. L. REV. 1431, 1436 (1962); Leflar, *Conflict of Laws*, 36 N.Y.U.L. REV. 36, 42 (1961).

v. *Adams*, 584 F.2d 893 (9th Cir. 1978); *Anselmi* v. *Denver Post, Inc.*, 552 F.2d 316 (10th Cir.), *cert. denied sub nom. Times Mirror Co.* v. *Anselmi*, 432 U.S. 911 (1977) (Justices Stewart and Powell noting dissent);[13] and *David* v. *National Lampoon, Inc.*, 432 F. Supp. 1097 (D.S.C. 1977). All three of those opinions specifically recognized that the position they took was in conflict with that of the Fifth Circuit line of cases, which they criticized.

The lineup of decisions therefore is as follows:[14]

First Amendment Must Be Considered	First Amendment May Not Be Considered
Georgia	California (the present case)
Second Circuit	Fourth Circuit *
Third Circuit *	Ninth Circuit
Fifth Circuit	Tenth Circuit
Seventh Circuit *	
Eleventh Circuit	
D.C. Circuit	

* District Courts.

Besides being clear, the split in jurisdictions is very current. Three of the decisions with which the decision below squarely conflicts were handed down in 1982. *Cox Enterprises, Inc.* v. *Holt, supra*; *McCabe* v. *Kevin Jenkins and Associates, Inc., supra*; *Bradlee Management Services, Inc.* v. *Cassells, supra.* It is time for this Court to resolve the matter.

[13] In *Anselmi*, the brief in opposition to certiorari argued that the federal question was not dispositive and that as of 1977 the conflict in the circuits was not clear. See Brief of Respondents in Opposition, *Times Mirror Co.* v. *Anselmi*, No. 76-1524, at 3, 5 (1977). Subsequent to *Anselmi* have come at least six decisions in other circuits and states, as noted herein, four of them rejecting *Anselmi* and two (including the court below) following it.

[14] The position of the First Circuit is unclear. In recently rejecting jurisdiction over out-of-state defendants in a defamation case, it cited with apparent approval from both lines of cases. *Keeton* v. *Hustler Magazine, Inc.*, 682 F.2d 33 (1st Cir. 1982), *cert. granted*, No. 82-485 (Jan. 24, 1983).

II. IN HOLDING THAT PERSONAL JURISDICTION MAY BE ESTABLISHED OVER OUT-OF-STATE EMPLOYEES BECAUSE OF A PUBLICATION BY THEIR CORPORATE EMPLOYER, THE DECISION BELOW CONFLICTS WITH HOLDINGS BY FIVE FEDERAL COURTS OF APPEALS AND BY TWO STATE COURTS.

The decision below also creates a second major conflict in the states and circuits which is itself sufficient to call for this Court's plenary review.

Each of the Appellants filed an unchallenged affidavit which stated that each of the Appellants performed whatever acts he did respecting the article solely in the course of his employment and "not acting in a personal capacity." Pp. 23a, 25a, *infra*. The court below held that nevertheless the two individuals were personally subject to extraterritorial jurisdiction for the acts they had performed solely on behalf of their employer.

The court explicitly recognized, p. 10a, *infra*, that in thus permitting personal jurisdiction over an out-of-state employee for acts done outside the state for the corporate employer, its holding conflicts with that of the Ninth Circuit in *Forsythe* v. *Overmyer*, 576 F.2d 779 (9th Cir.), *cert. denied*, 439 U.S. 864 (1978). The Ninth Circuit there held that

> "a corporate officer who has contact with a forum only with regard to the performance of his official duties is not subject to personal jurisdiction in that forum." 576 F.2d at 783-84.

The Ninth Circuit so held also in *Chem Lab Products, Inc.* v. *Stepanek*, 554 F.2d 371 (9th Cir. 1977), in which the court explained that to exercise *in personam* jurisdiction over an individual in such circumstances "would violate 'federal due process.'" 554 F.2d at 372. Because the Ninth Circuit includes California, the result of the present holding is that from now on the federal constitu-

tional law of personal jurisdiction over out-of-state employees will be applied differently depending on whether ea suit is brought in a state court in California, or a federal court sitting in that State.

The present holding on this point also conflicts with decisions of many courts besides the Ninth Circuit. As Chief Judge Weinstein stated the rule in *Bulova Watch Co.* v. *K. Hattori & Co.*, 508 F. Supp. 1322 (E.D.N.Y. 1981), a case the court below rejected, "under the 'fiduciary shield' doctrine, the acts of a corporate officer or employee taken in his corporate capacity [even] *within the jurisdiction* generally do not form the predicate for jurisdiction over him in his individual capacity." 508 F. Supp. at 1347 (emphasis supplied). Here, of course, Appellants' acts occurred *outside* California rather than "within the jurisdiction," so the conflict with the rule is even greater.

By holding as it did, the decision below squarely conflicts with court of appeals decisions in *Escude Cruz* v. *Ortho Pharmaceutical Corp.*, 619 F.2d 902 (1st Cir. 1980); *Weller* v. *Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974); *Wilshire Oil Co.* v. *Riffe*, 409 F.2d 1277 (10th Cir. 1969); *Margoles* v. *Johns*, *supra*; and with decisions of numerous federal district courts, *e.g.*, *Idaho Potato Comm'n* v. *Washington Potato Comm'n*, 410 F. Supp. 171 (D. Ida. 1975); *State Security Ins. Co.* v. *Frank B. Hall & Co.*, 530 F. Supp. 94 (N.D. Ill. 1981). It conflicts with a decision made after thorough review of the issue earlier last year by the Supreme Court of Iowa, *State ex rel. Miller* v. *Internal Energy Management Corp.*, 324 N.W. 2d 707, 711 (Ia. 1982), holding the fiduciary shield doctrine "a due process limitation on the exercise of jurisdiction," and with recent holdings by the courts of Illinois, *e.g.*, *Hurletron Whittier, Inc.* v. *Barda*, 82 Ill. App. 3d 443, 402 N.E.2d 840 (1980). The same result is sometimes reached as a construction of state long-arm statutes without reaching the constitutional issue, *cf.*

Marine Midland Bank v. *Miller*, 664 F.2d 899 (2d Cir. 1981), but more often as a matter of due process, *e.g.*, *State Security Ins. Co.* v. *Frank B. Hall & Co.*, *supra*, 530 F. Supp. 98; *Weller* v. *Cromwell Oil Co.*, *supra*; for discussion see *State ex rel. Miller* v. *Internal Energy Management Corp.*, *supra*, 324 N.W.2d at 711.

Supporting the court below, and the only authority it cited on this point, is one district court opinion, *Donner* v. *Tams-Witmark Music Library, Inc.*, 480 F. Supp. 1229 (E.D. Pa. 1979). The district court in that case relied on two other decisions of district courts in the Third Circuit, and acknowledged that its holding might appear in conflict with those of the Second, Sixth and Tenth Circuits cited above, because "as a rule the courts have declined to exercise personal jurisdiction over individuals for their acts done in a corporate capacity." 480 F. Supp. at 1233.

The majority rule—that personal jurisdiction over a corporation does not carry with it personal jurisdiction over individual out-of-state employees—has particular force when there is present the added element of the corporation being a publisher. Thus in *Bradlee Management Services, Inc.* v. *Cassells*, *supra*, the Supreme Court of Georgia specifically distinguished the reporter from the publisher, and held that although it was the reporter's acts as an employee that gave rise to the alleged tort, nevertheless although there was personal jurisdiction over the out-of-state corporation there was none over the out-of-state reporter. That decision is irreconcilable with the present ruling. See also *Margoles* v. *Johns*, *supra*; *Stop-A-Flat Corp.* v. *Electra Start of Michigan, Inc.*, 507 F. Supp. 647, 651 (E.D. Pa. 1981).

The conflict with cases throughout the country on the issue of jurisdiction over a publishing company's employees for acts performed on behalf of the publisher, is a separate and substantial basis for noting jurisdiction. Indeed, it is essential to resolve that issue here if federal law henceforth is to be applied consistently by state and federal courts sitting in the State of California.

III. THE COURT'S ALTERNATIVE HOLDING THAT PERSONAL JURISDICTION CAN BE BASED ON TELEPHONE CALLS INTO THE STATE IS IN CONFLICT WITH HOLDINGS OF OTHER COURTS, INCLUDING THE NINTH CIRCUIT.

A third conflict arises because the court below held that as to Appellant South, jurisdiction could be based alternatively on his having made a single telephone call to one Appellee, or alternatively on three news-gathering telephone calls and one visit to California.[15]

The Ninth Circuit has held just the opposite. In rejecting a claim of extraterritorial personal jurisdiction, it held:

> "use of the mails, telephone, or other international communications simply do not qualify as purposeful activity invoking the benefits and protection of the state." *Thos. P. Gonzalez Corp.* v. *Consejo Nacional de Produccion*, 614 F.2d 1247, 1254 (9th Cir. 1980).

As for visits, the Ninth Circuit in the same case held that visits on business unrelated to the case—as were Appellant South's—do not count in the jurisdictional analysis:

> "We find the crucial fact to be that this visit pertained only to transactions not at issue in this case." *Ibid.*

The Seventh Circuit likewise has held that "we agree with appellants that it would be somewhat artificial to use these sporadic visits to measure the significance of their contacts with Illinois." *Fisons Ltd.* v. *United States*, 458 F.2d 1241, 1249 (7th Cir.), *cert. denied*, 405 U.S. 1041 (1972) (Stevens, J.). The same rule is rec-

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[15] Although one visit should not be jurisdictionally significant, we note that there is no record support for the court's speculation that South visited California even once in connection with the article, and in fact he specifically denied it and his affidavit so stating is uncontradicted. P. 25a, *infra*. The plaintiffs had the burden of establishing the jurisdictional facts, *McNutt* v. *General Motors Acceptance Corp.*, 208 U.S. 178, 189 (1936), and "since plaintiff failed to counter the [defendants'] affidavits, the jurisdictional facts stated therein are controlling." *Escude Cruz* v. *Ortho Pharmaceutical Corp.*, *supra*, 619 F.2d at 907.

ognized in other jurisdiction. See, *e.g.*, *Margoles* v. *Johns*, *supra*, 333 F. Supp. at 944; *Hurletron Whittier, Inc.* v. *Barda*, *supra*; *Warren* v. *Dynamics Health Equip. Mfg. Co.*, 483 F. Supp. 788 (M.D. Tenn. 1980).

Thus once again, because of the decision below, this Court's review is necessary to keep federal law from being applied differently by state and federal courts in California.

IV. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT.

Basing jurisdiction over these two individual Appellants on the publishing activity of their corporate employer is directly contrary to this Court's holding in *Hanson* v. *Denckla*, 375 U.S. 235 (1958), that

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. . . . [I]t is essential in each case that there be some act by which the *defendant purposefully avails* [*him*]*self* of the privilege of conducting activities within the forum State. . . ." 357 U.S. at 253, *quoted in Kulko* v. *Superior Court*, *supra*, 436 U.S. at 93-94 (emphasis supplied).

The same language from *Hanson* v. *Denckla* is repeated in *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, 444 U.S. at 298. It was ignored by the court below.

Appellants here did not personally avail themselves of the privilege of conducting their personal activities in California. The fact that a corporate entity with which the defendant has a relation may be amenable to process of a state does not mean that the state also can assert jurisdiction over an out-of-state individual defendant, when "it cannot be said that the *defendant* engaged in any purposeful activity related to the forum." *Rusk* v. *Savchuk*, 444 U.S. 320, 329 (1980) (emphasis in original).[16]

[16] Moreover, "financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction

Accordingly, the trial court, relying on constitutional standards that it said "the U.S. Supreme Court has made abundantly clear in its *World-Wide Volkswagen* and *Kulko* opinions," held that personal jurisdiction over these two Florida individuals had not been established. The court below, however, in reversing, did not even cite *World-Wide Volkswagen* or *Kulko*. Indeed, in spite of extensive reference in the briefs to holdings of this Court, the court of appeal's only reference to any holding of this Court was a single passing citation to *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). See p. 6a, *infra*.[17]

Kulko v. *Superior Court*, 436 U.S. 84 (1978), was the most recent occasion on which this Court reviewed an attempt by California to expand its extraterritorial jurisdiction based on an allegation that an out-of-state person had "caused an effect in th[e] state." 436 U.S. at 88-89. Holding that due process requirements had not been met, this Court emphasized that policy considerations (there, "interests of family harmony" and preventing an "unreasonable burden on family relations," *id.* at 94, 98) are to be considered in deciding jurisdiction.

The court below concluded that for two Florida individuals to defend a multi-million dollar suit in a state court in California is not a substantial inconvenience to them, and emphasized instead that "this state and its residents and taxpayers have a substantial interest in providing a

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if they do not stem from a constitutionally cognizable contact with that State." *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, 444 U.S. at 299.

[17] The court below mistakenly claimed support for rejecting the First Amendment in the Chief Justice's concurring opinion in *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), which questioned whether the First Amendment should be read to give the institutional press rights not enjoyed by others. No such claim is involved here, and in fact Appellants are individuals, not an institution. Moreover, the Chief Justice's concern was that such a reading of First Amendments rights would be too narrow, not that it would be too broad. See 435 U.S. at 797-802.

forum where a resident may seek whatever redress is due him." P. 12a, *infra*.

What this Court has held is something quite different:

> "Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, 444 U.S. at 294.

The Appellants here are individuals. As such they had no contacts with California. As in *Rusk* v. *Savchuk*, *supra*, "[h]ere . . . the defendant has *no* contacts with the forum, and the Due Process Clause 'does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations.' " 444 U.S. at 332-33, *quoting in part International Shoe Co.* v. *Washington*, *supra*, 326 U.S. at 319 (emphasis in original). As this Court said in *Shaffer* v. *Heitner*, 433 U.S. 186 (1977),

> "The differences between individuals and corporations may, of course, lead to the conclusion that a given set of circumstances establishes state jurisdiction over one type of defendant but not over the other." 443 U.S. at 204 n.19.

The decision below cannot be reconciled with any of those holdings of this Court. Nor can it be reconciled with the line of decisions of this Court that holds extraterritorial jurisdiction unreasonably applied to inhibit interstate businesses also violates the Commerce Clause, Article I, § 8. See, *e.g.*, *Denver & R.G.W. R.R.* v. *Terte*, 284 U.S. 284 (1932); *Michigan C. R.R.* v. Mix, 278 U.S. 492 (1929). That doctrine remains fully applicable today. See, *e.g.*, *Froning & Deppe, Inc.* v. *Continental*

Illinois National Bank & Trust Co., 695 F.2d 289, 294 (7th Cir. 1982).

V. THE ISSUE IS AN IMPORTANT ONE.

This Court recently recognized the importance of personal-jurisdiction standards in cases involving interstate publications by its grant of certiorari last month in *Keeton* v. *Hustler Magazine, Inc.*, No. 82-485. The present case is even more compelling for review because it involves a much greater stretch of personal jurisdiction—beyond the out-of-state publisher to reach its out-of-state employees. And unlike *Keeton*, in which the First Circuit's opinion did not discuss the jurisdictional effect of the First Amendment, here that issue was raised and extensively argued—and the constitutional claim was expressly rejected by the court below. Hearing argument of the present appeal in conjunction with *Keeton* can assist this Court in clarifying the legal principles in this area.

The holding of the court below, sitting in the nation's most populous state, muddies established principles of jurisdiction, creates two conflicting rules of federal personal jurisdiction within the state of California, and threatens editors, reporters, and the editorial process everywhere in the country. By not only rejecting First Amendment considerations, but also going further and finding personal jurisdiction over an out-of-state newspaper's out-of-state *employees*, it extends extraterritorial jurisdiction beyond any other decision on the books.

This Court has been conscious in many contexts of the "risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); see also *Smith* v. *California*, 361 U.S. 147, 151 (1959); *cf. Froning & Deppe, Inc.* v. *Continental Illinois National Bank & Trust Co.*, *supra*, 695 F.2d at 294 (personal jurisdiction rejected because of chilling effect on interstate banking system). The trial court—a court that followed this Court's decisions, only to be reversed—correctly anticipated the problem:

> "It may not be unfair to hold a publisher to account for compensatory and punitive damages in a remote jurisdiction if a sensational story he publishes is false. After all, it is the publisher who balances risk and reward in establishing the character of his publication, and it is the publisher who stands to make substantial profits if he publishes true stories of widespread interest.
>
> "It is quite another matter to hold magazine employees to the same accounting. . . . Few would be willing to risk writing or editing controversial articles for national publication if they could be required personally to appear in remote jurisdictions as individual defendants and possibly suffer judgments for punitive damages, and surely pay unlimited litigation expenses. . . . If such a state of affairs were to come to pass, the informed public would be the loser." Pp. 19a-20a, *infra*.

This is a case in which "an uneasy and unsettled constitutional posture . . . could only further harm the operation of a free press." *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 247 n. 6 (1974).

CONCLUSION

For the reasons stated, this Court should note probable jurisdiction. The Court may wish to set the case for argument in tandem with No. 82-485.

Respectfully submitted,

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February 22, 1983

APPENDICES

APPENDIX A

Opinion and Judgment of the California Court of Appeal, Second Appellate District

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

2 Civil No. 65403

(Super.Ct.No. C-305009)

SHIRLEY JONES, *et al.*,
Plaintiffs and Appellants,

v.

IAIN CALDER, *et al.*,
Defendants and Respondents.

Filed Dec. 15, 1982

APPEAL from an order of the Superior Court of Los Angeles County. Eli Chernow, Judge. Reversed.

Hayes & Hume, Paul S. Ablon and Richard P. Towne for Plaintiffs and Appellants.

Williams & Connolly, John G. Kester, F. Lane Heard, Selvin & Weiner and Paul P. Selvin for Defendants and Respondents.

Plaintiffs appeal from an order granting motion to quash out-of-state service of process [1] upon two of the defendants in an action to recover compensatory and punitive damages for libel, invasion of privacy and intentional infliction of emotional distress.

The verified complaint alleges: Defendant National Enquirer, Inc. is a Florida corporation transacting business in California; it publishes the National Enquirer, a

[1] The order is appealable. (Code Civ. Proc., § 904.1, subd. (c).)

weekly periodical of national circulation. Defendant Iain Calder is the editor of the periodical. Defendant John South is a writer employed by the corporate defendant. At all times mentioned, Calder and South acted in the scope of their employment and also acted "by virtue of their own motives as individuals." In the October 9, 1979, issue of the National Enquirer defendants printed and published an untrue and libelous article concerning plaintiffs, Shirley Jones and Marty Ingels.[2] That issue was sold and distributed in the County of Los Angeles, where plaintiffs are well known and enjoy good names and reputations both personally and in their occupations as professional entertainers. In making said publication defendants acted maliciously and with intent to injure, defame and disgrace plaintiffs, place them in a false light, and cause them to suffer humiliation and emotional and physical distress. In their actions directed toward plaintiffs, both before and after publication of said article, defendants cause plaintiffs to suffer great emotional distress. Defendants failed to comply with plaintiffs' demand for publication of a retraction of the defamatory article.

Calder and South are residents of Florida and process was served on them in Florida by mail (Code Civ. Proc., §§ 415.30, 415.40). They appeared specially and moved to quash service of the summons on the ground that the court lacked personal jurisdiction over them.[3] (Code Civ. Proc., § 418.10.) The affidavits of Calder and South in support of the motion state that each is employed by National Enquirer, Inc.—Calder as its president and editor, and South as a reporter; each has his place of business at Enquirer headquarters, located in Florida; neither Calder nor South has even had an office or place of business in California, or engaged in business there; neither has ever

[2] Attached to the complaint and incorporated therein by reference is a copy of the article. South's name appears at the end of the article, indicating that he is its author.

[3] Defendant National Enquirer, Inc. did not contest the court's jurisdiction over it, and has answered the complaint.

owned assets, obtained employment or had a bank account in California; Calder performed editorial services in Florida in connection with the article which is the subject of plaintiffs' lawsuit, but did not otherwise participate in the preparation of the article; South performed reporting services in Florida in connection with the subject article; in performing their respective services relating to that article, neither Calder nor South was acting in his personal capacity and neither traveled to California.

In opposition to the motion to quash, plaintiffs filed declarations and excerpts from depositions showing: As president and editor of National Enquirer, Inc., Calder's duties "are to oversee just about every function of the Enquirer . . . to oversee the whole editorial process." Prior to the publication of the allegedly defamatory article concerning plaintiffs, Calder reviewed its evaluation and saw the final page proof form; after publication he determined not to print a retraction. In the three or four years preceding publication of that article, Calder traveled to California only once; that trip was for pleasure, not on business for the National Enquirer. During the same period, South traveled to California more than 20 times on Enquirer business, staying an average of one to two weeks each time. From 1977 to October 1979 Jane Chesis, a California resident, was employed by National Enquirer, Inc. to furnish it with leads for stories. Chesis introduced South to one Bobby Lucas, A year before the subject article was published, South met with Lucas in California on two occasions to discuss possible articles for the Enquirer; during the same period South had 20-25 telephone conversations with Lucas. Lucas provided information for some of the material which appeared in the subject article. By telephone Chesis (in California) supplied South (in Florida) with other material contained in that article. Two or three weeks before the article was published, South telephoned plaintiff Ingels at his home in California and read the article to him; as a result Ingels became emotionally upset and physically ill.

In granting the motion to quash, the trial court (in its memorandum of decision) stated: "From the record in this case, it appears that neither South nor Calder maintained any residence or business office within California. Editor Calder did not enter California nor even make telephone calls into the state during his work on the Ingels article. Reporter South made a few telephone calls into California, including one in which he read the substance of the article to plaintiff Ingels shortly before its publication. In addition, Reporter South visited California at least once for purposes relating to the article. The totality of such contacts, in this Court's view, are [*sic*] insubstantial." The Court further determined that in a defamation process such as this, where freedom of the press is involved, "First Amendment considerations should be weighed in the balance of fundamental fairness in resolving whether a state can compel a nonresident defendant to appear and defend an action." The court concluded that such considerations necessitated the granting of the motion to quash.

Plaintiffs contend that the trial court improperly applied a special First Amendment test in determining that the court may not assume jurisdiction over defendants Calder and South. We agree. As authority for its application of such a test, the court cited *New York Times Co.* v. *Connor* (5th Cir. 1966) 365 F.2d 567, wherein it was held that "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." (P. 572. See also *Rebozo* v. *Washington Post Co.* (5th Cir. 1975) 515 F.2d 1208, 1214-1215; *Edwards* v. *Associated Press* (5th Cir. 1975) 512 F.2d 258, 266.) This view has been rejected in other federal courts (including those of the Ninth Circuit), which conclude that First Amendment protections are better considered in the context of substantive defenses on the merits than at the initial jurisdictional stage of a defamation proceeding. (*Church of*

Scientology of California v. *Adams* (9th Cir. 1978) 584 F.2d 893, 899; *Anselmi* v. *Denver Post, Inc.* (10th Cir. 1977) 552 F.2d 316, 324, cert. den., 429 U.S. 1041 [50 L.Ed.2d 753, 97 S.Ct. 170].) And in California it has been held that newspapers do not enjoy a special preference under the First Amendment in deciding in personam jurisdiction questions dealing with the publication of allegedly tortious material. (*Sipple* v. *Des Moines Register & Tribune Co.* (1978) 82 Cal.App.3d 143, 148-150 (hg. den.).) After discussing the concurring opinion of Chief Justice Burger in *First National Bank of Boston* v. *Bellotti* (1978) 435 U.S. 765, 796-802 [55 L.Ed.2d 707, 730-734, 98 S.Ct. 1407, 1426-1439], the *Sipple* court stated: "The conclusion of the Chief Justice that the First Amendment fails to give special protection to the 'institutional press' under a freedom of the press theory parallels the finding that it also fails to give special protection from jurisdiction to defendants whose tortious acts performed out of state arise from exercise of rights arguably protected by the First Amendment. Though the *Connor* decision, relied on by respondents, appears to give such protection, that decision 'has been widely criticized and disregarded [citations], and appears now to have been discarded by the Fifth Circuit itself [citations].' (*David* v. *National Lampoon, Inc.* (D.S.C. 1977) 432 F. Supp. 1097, 1100; accord *Anselmi* v. *Denver Post, Inc.* (10th Cir. 1977) 552 F.2d 316, 324.)" (82 Cal.App.3d at p. 149.)

Inasmuch as defendants Calder and South have no special First Amendment privilege by virtue of their status as employees of the publisher of the allegedly defamatory article herein, the right of a California court to assert personal jurisdiction over them must be determined in accord with traditional principles unaffected by First Amendment considerations.

Code of Civil Procedure section 410.10 permits California to exercise jurisdiction over nonresidents "on any

basis not inconsistent with the Constitution of this state or of the United States." This statute "manifests an intent to exercise the broadest possible jurisdiction. The constitutional perimeters of this jurisdiction are found in the decisions of the United States Supreme Court." (*Michigan Nat. Bank* v. *Superior Court* (1972) 23 Cal. App.3d 1, 6.) As a general constitutional principle, a court may exercise personal jurisdiction over a nonresident individual so long as he has such minimal contacts with the state that ". . . the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (*Internat. Shoe Co.* v. *Washington* (1945) 326 U.S. 310, 316-317 [90 L.Ed. 95, 101-103, 66 S. Ct. 154]; *Sibley* v. *Superior Court* (1976) 16 Cal.3d 442, 445.) "If a nonresident defendant's activities may be described as 'extensive or wide-ranging' [citation] or 'substantial . . . continuous and systematic' [citation], there is a constitutionally sufficient relationship to warrant jurisdiction for all causes of action asserted against him. In such circumstances, it is not necessary that the specific cause of action alleged be connected with the defendant's business relationship to the forum. [¶] If, however, the defendant's activities in the forum are not so pervasive as to justify the exercise of general jurisdiction over him, then jurisdiction depends upon the quality and nature of his activity in the forum in relation to the particular cause of action. . . . The crucial inquiry concerns the character of defendant's activity in the forum, whether the cause of action arises out of or has a substantial connection with that activity, and upon the balancing of the convenience of the parties and the interests of the state in assuming jurisdiction. [Citations.]" (*Cornelison* v. *Chaney* (1976) 16 Cal.3d 143, 147-148.)

Applying these rules to the instant case, it is clear that California does not have general jurisdiction over defendants Calder and South. Neither defendant has ever owned assets or bank accounts in California, or engaged in business or been employed there. It may not be said

that defendants' activities in California are extensive, wide-ranging, substantial, continuous or systematic. In *Cornelison, supra,* 16 Cal.3d 143, the court considered facts which revealed that the defendant had made 20 trips a year into California over a period of 7 years to deliver and obtain goods, and an independent contractor relationship with local brokers, and was licensed to haul freight by the California Public Utilities Commission; the court failed to find in these facts a basis for general jurisdiction by California courts. If general jurisdiction did not there exist, clearly there can be no general jurisdiction in the present case as a result of defendants' contacts with California consisting of occasional trips to that state. We now proceed to an assessment of the relationship between defendants' activities in California and the causes of action alleged herein.

As the trial court observed, defendant Calder did not enter California or even make telephone calls into the state in connection with his role in the preparation of the subject article; all of his acts with reference to that article apparently were performed in Florida. However, the requisite minimum contacts of a defendant with the forum state need not arise from his physical activity in that state. (*St Joe Paper Co.* v. *Superior Court* (1981) 120 Cal.App.3d 991, 997.) "Every state has a natural interest in effects occurring within its territory, even if the act causing those effects was committed elsewhere. (See Rest.2d Conf. of Laws, § 37, com. a.) . . . [¶] If a defendant commits an act or omission outside the forum state *with the intent* to cause a tortious effect within the state, the state may exercise jurisdiction over the defendant as to any cause of action arising from the effects. *The intent to cause tortious injury within the state when the tort actually occurs is generally a sufficient basis, without more, for the exercise of in personam jurisdiction.* 'The act may have been done with the intention of causing effects in the state. If so, the state may exercise the same judicial jurisdiction over the actor, or

over the one who caused the act to be done, as to causes of action arising from these effects as it could have exercised if these effects had resulted from an act done within its territory.' (Rest.2d Conf. of Law, § 37, com. a; see § 36, subd. (1).)" (*Kaiser Aetna* v. *Deal* (1978) 86 Cal.App.3d 896, 902; latter emphasis added. See also Judicial Council Comment, 14 West's Anno. Code Civ. Proc., p. 473; *Quattrone* v. *Superior Court* (1975) 44 Cal.App. 3d 296, 303-304). The complaint herein alleges that defendants, in publishing the defamation article, acted maliciously and with the intent to injure plaintiffs. The general rule for defamation is that everyone who takes a responsible part in the publication is liable for the defamation. (*McGuire* v. *Brightman* (1978) 79 Cal.App.3d 776, 789). For the purpose of determining whether a California court may assume jurisdiction over Calder in this lawsuit, it must be presumed that Calder, in participating in the publication of the article as its editor, intended to cause injury to plaintiffs in California where they reside; such injury in fact occurred. Accordingly, a valid basis exists for California's exercise of personal jurisdiction over Calder with respect to the causes of action alleged herein.

In support of a contrary conclusion, defendants cite *Sibley* v. *Superior Court*, *supra*, 16 Cal.3d 442, wherein it is stated (p. 446): "The mere causing of an 'effect' in California . . . is not necessarily sufficient to afford a constitutional basis for jurisdiction; notwithstanding this 'effect,' the imposition of jurisdiction may be unreasonable." *Sibley* was a breach of contract action and it was there held that despite defendant's relationship to California, and the effects thereby caused in California, the exercise of jurisdiction was unreasonable because it did not appear that defendant purposefully availed himself of the privilege of conducting business in California or of the benefits and protections of California laws, that defendant anticipated any economic benefit as a result of his dealings in this state, or that there were any

aspects of the transaction which were subject to special regulation in California. However, such conditions need not be met where jurisdiction is predicated on an act or omission committed outside the forum state with the intent to cause a tortious effect within the state. Thus, in *Abbot Power Corp.* v. *Overhead Electric Co.* (1976) 60 Cal.App.3d 272, an action for intentionally inducing breach of contract, the court, after discussing *Sibley* stated: "There is no reason to require any special circumstances where, as here, the conduct charged is an intentional and malicious tort against a forum-based corporation. The fundamental question is whether the exercise of jurisdiction is fair and reasonable. It is just as reasonable and fair, maybe more so, to subject a defendant to the jurisdiction of a state when it engages in conduct which is purposefully intended to harm a resident of that state as it is to subject a defendant to the jurisdiction of a state when the defendant has sought or anticipated economic benefit in that state from its out-of-state activities." (Pp. 281-282; fn. omitted.)

The foregoing analysis likewise applies to defendant South insofar as his writing and reporting activities in connection with the subject article were performed in Florida. Moreover, apart from the tortious effect which his Florida activities produced in California, South had other contacts with California sufficient to permit the courts of that state to assume personal jurisdiction over him in this action. The record shows that he gathered information appearing in the allegedly defamatory article in the course of at least one visit made by him to California and telephone calls which he made to the state. Expressed differently, the material for the article had its source in California and South tapped that source both by telephone and by personal visits to California. In addition, before the article was published South telephoned plaintiff Ingels at his residence in California and read to him the substance of the article, thereby causing him to suffer emotional distress accompanied by physical illness.

In *Abbot Power Corp.* v. *Overhead Electric Co., supra,* 60 Cal.App.3d 272, it was held that nonresident defendants' sending of letters into California which interfered with plaintiff's contractual relationship constituted the doing of a significant act in California for purposes of exercising jurisdiction over defendants. (P. 279.) By the same token South's telephone call to Ingels, which call was instrumental in the commission of one of the torts of which plaintiffs complain, constituted the doing of a significant act in California. For all of the above reasons, we conclude that South had sufficient minimum contacts with the State of California in respect to the causes of action at issue to justify assumption of jurisdiction by a California court over him in this lawsuit.

Defendants argue that California may not assume jurisdiction over them because they performed the allegedly tortious acts in their respective capacities as officer and employee of the corporate defendant, not as individuals.[4] In support of this contention defendants cite *Bulova Watch Co., Inc.* v. *K. Hattori & Co., Ltd.* (E.D.N.Y. 1981) 508 F. Supp. 1322, wherein it is stated: "Under the 'fiduciary shield' doctrine, the acts of a corporate officer or employee taken in his corporate capacity within the jurisdiction generally do not form the predicate for jurisdiction over him in his individual capacity." (P. 1347). See also *Forsythe* v. *Overmyer* (9th Cir. 1978) 576 F.2d 779, 783-784, cert. den., 439 U.S. 864 [58 L.Ed.2d 174, 99 S.Ct. 188]; *Quattrone* v. *Superior Court, supra,* 44 Cal.App.3d 296, 308.) Defendants' affidavits in support of their motion to quash service of summons state

[4] In its memorandum of decision, the trial court stated: "It may not be unfair to hold a publisher to account for compensatory and punitive damages in a remote jurisdiction if a sensational story he publishes is false. After all, it is the publisher who balances risk and reward in establishing the character of his publication, and it is the publisher who stands to make substantial profits if he publishes true stories of widespread interest. [¶] It is quite another matter to hold magazine employees to the same accounting. . . ."

that defendants, in performing their services relating to the subject article, were acting on behalf of the National Enquirer, Inc., and not in "a personal capacity." However, as stated in *Donner* v. *Tams-Witmark Music Library, Inc.* (E.D. Pa. 1979) 480 F. Supp. 1229, 1234: "It would be anomalous, and would defeat the purposes of the law creating substantive liability, to permit a corporate officer to shield himself from jurisdiction by means of the corporate entity, when he could not interpose the same shield as a defense against substantive liability. Therefore we hold that Aborn's allegedly tortious conduct in his capacity as president of Tams-Witmark may be considered to determine whether the court has jurisdiction over Aborn as an individual defendant." Unlike Calder, South is an employee rather than an officer of the corporate defendant. That fact, however, does not prevent the assumption of jurisdiction over him in this action. Thus, in *McGuire* v. *Brightman, supra*, 79 Cal.App.3d 776, the court rejected defendant's argument that jurisdiction over him was improper because he was a reporter, not the publisher of the defamatory article. Said the court: "Appellant has cited no authority for any contention that he may have that an author is not a proper defendant in an action for libel printed in a periodical. To the contrary, the general rule for defamation is that everyone who takes a responsible part in the publication is liable for the defamation. [Citation.] And even if appellant could somehow avoid liability for his acts for [the publisher], it would not follow that jurisdiction could not be maintained based upon those acts. Thus, it seems clear that appellant's status as the author instead of the publisher does not create a legal distinction invalidating jurisdiction over him. [Citations.]" (79 Cal. App.3d at p. 789.)

Once it is established that the defendant has the required minimum contacts in the forum state and that the cause of action is sufficiently connected with these minimum contacts, the propriety of an assumption of juris-

diction depends upon a balancing of the inconvenience to the defendant in having to defend himself in the forum state against both the interest of the plaintiff in suing locally and the interrelated interest of the state in assuming jurisdiction. (*Buckeye Boiler Co.* v. *Superior Court* (1969) 71 Cal.2d 893, 899.) Some of the factors involved in this balancing process include the relative availability of evidence and the burden of defense and prosecution in one place rather than another; the interest of a state in providing a forum for its residents; the ease of access to an alternative forum; the avoidance of a multiplicity of suits and conflicting adjudications; and the extent to which the cause of action arose out of defendant's local activities. (*Cornelison* v. *Chaney, supra,* 16 Cal. 3d 143, 151; *Fisher Governor Co.* v. *Superior Court* (1959) 52 Cal.2d 222, 225-226.)

In the present case, much of the evidence presumably is in California inasmuch as that is where the causes of action arose, where plaintiffs reside and pursue their careers, and where they are most seriously damaged by the alleged torts; California also is the residence of two of the persons (Chesis and Lucas) who furnished material appearing in the defamatory article published by defendants. The California Supreme Court "has repeatedly emphasized that this state and its residents and taxpayers have a substantial interest in providing a forum where a resident may seek whatever redress is due him. [Citations.] The state also has an interest from the point of view of orderly administration of the laws in assuming jurisdiction in cases where most of the evidence is within its borders and where a refusal to take jurisdiction may result in multiple litigation. [Fn. omitted.]" (*Hall* v. *University of Nevada* (1972) 8 Cal.3d 522, 525-526.) In their respective capacities as president-editor and reporter-writer for the National Enquirer, Calder and South most likely will be required to appear as witnesses and thus will be present in California regardless of whether a California court assumes jurisdiction over

them as defendant. Plaintiff sued National Enquirer, Inc. as well as Calder and South; the corporate defendant has not contested the California court's jurisdiction over it and the action is proceeding against it. If California does not assume jurisdiction over Calder and South plaintiffs may sue them in Florida, resulting in multiple litigation and possible conflicting adjudications. Finally, the torts of which South is accused relate directly to, and arise out of, his local conduct. Under these circumstances, it is fair and reasonable to subject defendants Calder and South to the jurisdiction of the California courts.

The order granting motion to quash service of process is reversed.

CERTIFIED FOR PUBLICATION

LILLIE, J.

We concur:

SPENCER, P.J.

DALSIMER, J.

APPENDIX B

Order of the Supreme Court of California Denying Hearing

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

Feb. 10, 1983

I have this day filed Order HEARING DENIED.

In re: 2 Civ No. 65403

JONES & INGELS

vs.

CALDER & SOUTH

Respectfully,

Clerk

APPENDIX C

Opinion of the Superior Court for the County of Los Angeles

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C 305 009

SHIRLEY JONES and MARTY INGELS,
Plaintiffs,

vs.

NATIONAL ENQUIRER, INC., *et al.*,
Defendants.

MEMORANDUM OF DECISION

This case is based upon an article published in the National Enquirer, which article was allegedly libelous as to plaintiffs Shirley Jones and Marty Ingels. The motion before the Court is to quash service of process on two individual defendants claimed to be legally responsible for the article. One, John South, was the author; the other, Iain Calder, was the editor of the magazine. Both were employees of defendant National Enquirer; both reside in Florida. These individual defendants assert that California courts lack personal jurisdiction over them, relying upon the recent U.S. Supreme Court decisions in *World-wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), and *Kulko v. California*, 436 U.S. 84 (1978). The motion before the Court does not address jurisdiction over the publication and its publisher. There is no contention that National Enquirer may not properly be required to appear in California and defend this action.

In the first analysis, it is necessary to examine the contacts between the individual defendants on the one

hand, and the forum state, California, on the other, to determine whether there is a sufficient nexus for California to assert jurisdiction over these individuals. *International Shoe v. Washington*, 326 U.S. 310 (1945). From the record in this case, it appears that neither South nor Calder maintained any residence or business office within California. Editor Calder did not enter California nor even make telephone calls into the state during his work on the Ingels article. Reporter South made a few telephone calls into California, including one in which he read the substance of the article to plaintiff Ingels shortly before its publication. In addition, it may fairly be inferred from the record before the Court that Reporter South visited California at least once for purposes relating to the article. The totality of such contacts, in this Court's view, are insubstantial.

The most substantial basis for asserting a claim against the individual defendants is that both defendants knew, or certainly should have known, that the article would be published and read in plaintiffs' home community within California, that plaintiffs' personal and business reputations were likely to be substantially damaged by the publication, and that such substantial damage experienced by plaintiffs would occur in their home and business communities within California. Moreover, unlike the case of *World-wide Volkswagen, supra*, the location of the damage to the plaintiffs was not incidental nor remote from the business of defendant. The value of the article to the publisher was precisely that it was a sensational story that would expose unfavorable aspects of well-known people and, thus, would cause embarrassment and damage to the reputations of the plaintiffs. Thus, plaintiffs contend that California's jurisdiction extends sufficiently far to require the individual defendants to appear and answer for the alleged falsity of the article.

Plaintiffs contend that this case is analogous to one in which a defendant ships a dangerous and defective prod-

uct into the state, which leads to an accident within the state, causing substantial damage to a California resident. Indeed, if the injury complained of in this case involved a physical injury sustained as a result of a physically defective magazine shipped into California, then the analysis would end at this point and the motion to quash would be denied. *Buckeye Boiler v. Superior Court*, 71 Cal.2d 893 (1969).

The question presented by this case is whether further consideration is required because the case involves First Amendment freedom of expression and because the defendants sought to be brought into this jurisdiction are employees of the publisher. At bottom, the test for the validity of a state's assertion of jurisdiction over a nonresident defendant is not based upon whether the state's geographic boundaries were crossed, nor upon an overly refined analysis of how long a defendant spent on phone calls to California, but rather it is based upon an analysis of the fundamental fairness involved in light of traditional notions of justice. *International Shoe, supra.* The question becomes, then, whether, in assessing the fundamental fairness of the proposed assertion of jurisdiction, the Court should weigh and consider additional factors in cases where freedom of the press is involved. There appears to be some authority to the contrary in California, *Sipple v. Des Moines Register*, 82 Cal.App.3d 143; *McGuire v. Brightman*, 79 Cal.App.3d 776.[1] However, as the U.S. Supreme Court has made abundantly clear in its *World-Wide Volkswagen* and *Kulko* opinions,

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[1] (But see Comment of Judicial Council to C.C.P. § 410.10, "Bases of Judicial Jurisdiction Over Individuals," (9):

> "Some actions, such as defamation, affect interests of a defendant that are protected by the First Amendment of the United States Constitution. For a state to have judicial jurisdiction over such action, it may be that the defendant must have a closer relationship to the state, or have caused effects of a more substantial nature in the state, than would otherwise be required."

California may not assert jurisdiction beyond that which is permitted under the United States Constitution. The most comprehensive discussions of the effects of the First Amendment, as it relates to the reach of a state's jurisdiction over nonresidents, are found primarily in the decisions of the U.S. Court of Appeals for the 5th Circuit in *New York Times v. Connor*, 365 F.2d 567 (1966); *Walker v. Savell*, 335 F.2d 536 (1964), and *Edwards v. Associated Press*, 512 F.2d 258 (1975), and in *Buckley v. N.Y. Post*, 373 F.2d 175 (2d Cir. 1967). These cases reached varying results as to whether a particular publication could be required to appear and answer particular complaints. However, the cases seem to be in agreement that First Amendment considerations should be weighed in the balance of fundamental fairness in resolving whether a state can compel a nonresident defendant to appear and defend an action. This proposition of federal constitutional law is binding upon this Court.

Applying First Amendment considerations, it appears to this Court that the balance favors the individual defendants. Whether or not the individual defendants South and Calder are required to appear as parties in this case, plaintiffs' rights can be fully satisfied. The publisher, who is the financially responsible party, will remain in the action regardless of the outcome of this motion. Indeed, it has not even been suggested that the National Enquirer itself is beyond California's jurisdiction. There is no reason to believe that plaintiffs' ability to win or collect a judgment would be enhanced if judgment were awarded jointly against the National Enquirer and its two employees, rather than the Enquirer alone. South and Calder may still be required to give testimony under oath at discovery deposition. Other discovery devices are available to bring to light any knowledge or information these individuals have relating to this action.

Indeed, in balancing the interests of all parties to this action, it appears that the principal practical effect of

holding the individual defendants as parties to this lawsuit would be to facilitate plaintiffs' claims for punitive damages against the individuals. Such claims are asserted in addition to plaintiffs' claims for such damages against the publisher. Surely the right of a plaintiff to punish a defendant resident of a remote jurisdiction, and to receive damages beyond those necessary to compensate him for his injury should not weigh heavily on the constitutional scale of fundamental fairness. On the other hand, if reporters and editors are required to appear in remote jurisdictions and defend against claims for punitive damages, it is foreseeable that such actions would have a chilling effect on reporters and editors.

It may not be unfair to hold a publisher to account for compensatory and puntive damages in a remote jurisdiction if a sensational story he publishes is false. After all, it is the publisher who balances risk and reward in establishing the character of his publication, and it is the publisher who stands to make substantial profits if he publishes true stories of widespread interest.

It is quite another matter to hold magazine employees to the same accounting. A reporter or editor who suffers an award of punitive damages would not be entitled to reimbursement from his employer, nor to indemnification based on any insurance policy the employee or the employer might have. Thus, punitive damages would come from the employee's own pocket. Few would be willing to risk writing or editing controversial articles for national publications if they could be required personally to appear in remote jurisdictions as individual defendants and possibly suffer judgments for puntive damages, and surely pay unlimited litigation expenses. Thus, prudent reporters and editors would have an incentive to avoid controversial stories vastly disproportional to the rewards they could expect for their diligence and industry in uncovering truthful but controversial stories, especially stories adverse to wealthy or powerful individuals. If

such a state of affairs were to come to pass, the informed public would be the loser. cf. *New York Times* v. *Connor*, *supra*.

Finally, quashing service in this case does not necessarily even defeat plaintiffs' right to recover punitive damages from the individual defendants. If their conduct is sufficiently wrongful, punitive damages might well be available if suit is brought in defendants' home jurisdiction, or in some other jurisdiction with which their contacts are more substantial.

For the foregoing reasons, the motions to quash are granted.

DATED: October 2, 1981.

/s/ Eli Chernow
ELI CHERNOW
Judge of the Superior Court

APPENDIX D

Notice of Appeal

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COURT OF APPEAL
SECOND DIST.

FILED
FEB 16 1983

CLAY ROBBINS JR.
Clerk

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

Civil No. 65403

SHIRLEY JONES and MARTY INGELS,
Plaintiffs and Appellants,

v.

IAIN CALDER and JOHN SOUTH,
Defendants and Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Iain Calder and John South, Respondents herein, hereby appeal to the Supreme Court of the United States from the final judgment of this

Court entered December 15, 1982, that reversed the order of the Superior Court of the State of California for the County of Los Angeles entered October 2, 1981, quashing service of process on Respondents.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

WILLIAMS & CONNOLLY

By: /s/ John G. Kester
JOHN G. KESTER

/s/ F. LANE Heard III
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Attorneys for Respondents

February 16, 1983

[Certificate of Service Omitted in Printing]

APPENDIX E

AFFIDAVIT OF IAIN CALDER

STATE OF FLORIDA)
) ss.
COUNTY OF)

Iain Calder, first duly sworn, deposes and says:

1. I have personal knowledge of the facts herein stated and if sworn as a witness could testfy competently thereto.

2. I am a resident of Florida.

3. I am employed by the National Enquirer, Inc. as President and editor. This is my sole business activity. My place of business is the Enquirer headquarters, located in Lantana, Florida. I do not now have and never had an office or place of business in California.

4. I have never engaged in any other business activity in California or conducted interstate business with California in my personal capacity. I do not now and never have owned assets of any kind in California. I have never obtained credit or had any bank accounts in California.

5. I did not directly participate in the preparation of the Enquirer on the article which is the subject of this lawsuit. In 1979, I performed certain editorial services on behalf of the National Enquirer in connection with the article which is the subject of this lawsuit. During the course of my duties, I was not acting in a personal capacity and did not travel to California. Any editorial services performed in connection with the article took place in Lantana, Florida.

/s/ Iain Calder
IAIN CALDER

Subscribed and sworn to before
me on 20th day of April, 1981.

/s/ [Illegible]
Notary Public in and
for said County and State

Notary Public, State of Florida at Large
My Commission Expires Dec. 4, 1981
Bonded by American Fire & Casualty Company

APPENDIX F

AFFIDAVIT OF JOHN SOUTH

STATE OF FLORIDA)
) ss.
COUNTY OF)

John South, first duly sworn, deposes and says:

1. I have personal knowledge of the facts herein stated, and if sworn as a witness could testify competently thereto.

2. I am a resident of Florida.

3. I am employed by the National Enquirer, Inc. as a reporter. This is my sole business activity. My place of business is the Enquirer's national headquarters, located in Lantana, Florida. I do not now have and never have had an office or place of business in California.

4. I have never engaged in any business activity in California in my personal capacity and I have never conducted any business in California or engaged in interstate business with California in my personal capacity. I do not now and never owned assets of any kind in California. I have never obtained credit or had any bank accounts in California.

5. In 1979, I performed certain reporting services in Lantana, Florida on behalf of the National Enquirer, Inc. in connection with the article which is the subject of this lawsuit. In the course of my duties, I was not acting in my personal capacity and did not travel to California. All of my services performed in connection with the article took place in Lantana, Florida.

/s/ John South
JOHN SOUTH

Subscribed and sworn to before
me on 29th day of April,
1981.

/s/ Dana Owens Underwood
Notary Public in and
for said County and State

Notary Public, State of Florida at Large
My Commission Expires Dec. 7, 1983
Bonded by American Fire & Casualty Company